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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

No. 567.

PAN-ATLANTIC STEAMSHIP CORPORATION,

Petitioner,

—against—

JAMES FYFE; and JOHN T. BAILEY doing business as United Fibre Company,

Respondents.

BRIEF ON BEHALF OF RESPONDENTS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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Statement.

Barber-Wilhelmsen Line, hereinafter referred to as Wilhelmsen, and petitioner, Pan-Atlantic Steamship Corporation, are both vessel owners engaged in the common carriage of merchandise (R., p. 61). The vessels of the former ply between Far Eastern ports and New York; the vessels of the latter between New York and Gulf ports. For some time prior to the loss which this case involves, the two carriers had been parties to a traffic agreement under which Wilhelmsen agreed to deliver to petitioner cargo which Wilhelmsen received in the Far East for through carriage to Gulf ports, and petitioner agreed to effect on-carriage from New York to Gulf ports (R., pp. 42, 43, 63; Ex. 16, R., p. 104, offered, R., p. 63).

Under the terms of the traffic agreement the parties agreed on a division of the through freight and also agreed that the cost of such lighterage as might be required in New York Harbor would be "absorbed" by the parties on the same basis as that on which the through freight was divided between them (Ex. 16, R., p. 104, offered, R., p. 63). Petitioner had a contract with Manhattan Lighterage Corporation (hereinafter called Manhattan) for lighterage of cargoes in New York Harbor (R., pp. 59, 56; Ex. 14, R., p. 102, offered, R., p. 57).

On July 28, 1937, Wilhelmsen wrote petitioner that its S. S. "Tai Yin" was to discharge the two shipments of cargo which this suit involves at New York and that this cargo was to be on-carried to New Orleans. It instructed petitioner to arrange to have a lighter at the Wilhelmsen pier on or after August 2nd (R., pp. 43, 44, 46, 67; Ex. 1, R., p. 85, offered, R., pp. 43-44). With that letter Wilhelmsen sent petitioner copies of the two through bills of lading covering transportation of the two shipments of cargo in question from the Philippines to New Orleans (R., pp. 49, 66, 67; Ex. 1, R., p. 85, offered, R., pp. 43-44; Exs. 8 and 9, R., pp. 9, 11, offered, R., p. 49). Petitioner thereupon directed Manhattan to send a lighter to the Wilhelmsen pier to lift the cargo and transport it to petitioner's pier for loading on the on-carrying vessel (R., pp. 55, 69; Ex. 12, R., p. 99, offered, R., p. 54; Ex. 17, R., p. 105, offered, R., p. 68).

By virtue of petitioner's instructions, Manhattan sent its lighter "Sydney" to the Wilhelmsen pier and lifted the cargo, the lighter master giving a receipt to Wilhelmsen (R., p. 46; Exs. 2, 3, R., pp. 86, 87, offered, R., pp. 46-47). With the cargo on board the lighter proceeded to petitioner's pier where it was made fast at a point convenient to the berth of petitioner's steamer which was to carry the cargo to Gulf ports (R., pp. 72-74, 82). The cargo

was damaged by fire on the lighter while it lay at petitioner's pier (R., p. 82).

It was not petitioner's custom to issue bills of lading for cargo which it on-carried under its traffic arrangement with Wilhelmsen. The arrangement between the parties was that petitioner would complete the transportation under the terms of the through bills of lading which Wilhelmsen had issued in the Far East. Petitioner had no intention of issuing its own bills of lading for the cargo in suit (R., p. 70).

The through bills of lading issued by Wilhelmsen covering the cargo in this case, provided for transshipment at New York (Exs. 8, 9, R., pp. 9, 11, offered, R., p. 49) and set out that Wilhelmsen should be considered the shippers' agent to arrange for on-carriage (R., p. 19, offered, R., p. 49).

Libel was filed against Wilhelmsen, Manhattan and petitioner. On exceptions to the libel it was found below that no cause of action was stated against Wilhelmsen (R., p. 27). Manhattan filed a petition for limitation of liability and pleaded total exemption under the Fire Statute, and the District Court decreed that it was entitled to exoneration because the damage to the cargo by fire did not result from the personal neglect of the lighter owner (R., p. 139).

The petitioner's statement of the case in its petition for the writ omits the vital fact that both courts below found that the destruction of respondent's cargo resulted from the negligence of the agent which petitioner employed to satisfy its obligations as a carrier. Indeed, petitioner alleged in its pleadings that the fire which destroyed the cargo resulted from the "Manhattan's" negligence (R., pp. 31, 32).

The Issues Tried Below.

Petitioner argued below as it does in its present petition that Wilhelmsen, Manhattan and petitioner were three independent connecting carriers in that order, and as the damage arose while the cargo was on Manhattan's lighter, that petitioner should not be held liable. Both courts below held that there were but two connecting carriers—Wilhelmsen and petitioner; that Manhattan was but an agency employed by petitioner to perform its obligation; and as the cargo was damaged as the result of the negligence of the agency which petitioner chose to perform its obligation in connection with the "proper loading, stowage, custody, care * * * of * * * property committed to its * * * charge", it could not escape liability (Harter Act, Secs. 1 and 2; Title 46 U. S. C., Secs. 190, 191).

Both courts below also held that petitioner is not entitled to the exemptions of the Fire Statute (R. S. 4282; Title 46 U. S. C. 182) because petitioner was neither the owner of the lighter, nor a charterer who manned, victualed and navigated her.

POINT I.

Petitioner is liable for the negligent destruction of respondents' cargo.

Petitioner argues that Manhattan was a connecting carrier between Wilhelmsen and petitioner; and that as the damage arose while the cargo was in Manhattan's possession and as the result of the negligence of its employee, petitioner is not liable. It is urged that Manhattan was independent of both Wilhelmsen and petitioner and that neither had any stock interest in Manhattan.

Manhattan was engaged, under petitioner's direction, in lightering cargo between two piers in the port of New York. Until the exigencies of this case required the ar-

gument, no one had considered that any lighterman who might be engaged in furtherance of the through transportation, was an independent connecting carrier: the agreement between Wilhelmsen and petitioner provided for the whole of the through freight to be divided between them on a fixed basis, and the agreement between them in relation to lighterage was that its cost should be "absorbed" by the two carriers on the same basis as that on which freight was apportioned between them (Ex. 16, R., p. 104, offered, R., p. 63).

In support of its argument, petitioner cites and relies on a number of decisions of this Court to the effect that under a through bill of lading the respective connecting rail carriers can only be held liable for damage arising on their own lines (except that the initial and terminal carrier can, of course, under the Transportation Act (49 U. S. C., Sec. 20 (11)), be held liable for damage arising on any line). This principle is, we think, well established by the decisions of this Court, but, we submit, it has no application here.

The decision of this Court in *Missouri-Pacific R. R. Co.* v. *Reynolds-Davis Grocery Co.*, 268 U. S. 366, is, we submit, directly in point. There a car of merchandise was shipped from Raceland, Louisiana, to Forth Smith, Arkansas, under a through bill of lading which named the Missouri-Pacific R. R. as the terminal carrier. As the tracks of that railroad entered Fort Smith but did not connect with the consignee's warehouse, it employed the St. Louis-San Francisco Railroad and paid it a switching charge, to switch the car from the Missouri-Pacific tracks over the St. Louis-San Francisco tracks to the consignee's warehouse. This Court held (at p. 369):

> "The switching carrier was not named in the bill of lading and did not receive any part of the joint through rate. It was simply the agent of the Missouri-

> Pacific for the purpose of delivery. The Missouri-Pacific was the delivering carrier and is liable as such."

In the instant case Manhattan was not named in the bill of lading as a carrier (Exs. 8, 9, pp. 9, 11, offered, R., p. 49); it received no part of the freight; it merely was performing lighterage under the direction of petitioner, for a lighterage charge agreed upon between petitioner and Manhattan (R., pp. 56, 57; Exs. 14, 15, R., pp. 102, 103, offered, R., p. 57), so that petitioner might discharge its obligation as carrier.

Lighterage of cargo to a carrier who has agreed to transport it, when conducted by that carrier or its agency, is "part of the loading of the ship".

In *Morris, et al.* v. *Lamport & Holt, Ltd.*, 54 F. (2d) 925 (S. D. N. Y.), affirmed without opinion, 57 F. (2d) 1081 (C. C. A. 2), during the course of lighterage to a vessel cargo sustained damage as the result of the improper condition of certain cables in connection with which the lighter was maneuvered. The bill of lading contained a provision that the carrier should not be liable for loss due to "risk of craft to or from the ship" and it provided that this exception should apply whether or not the loss resulted from the lighterman's negligence. In the course of his opinion the trial Judge (Patterson, *J.*) said (at p. 926):

> "*To the extent that the clause purports to relieve the carrier in cases of negligence of the lighterman, it is void under the Harter Act.* The transportation of the skins from the shore to the ship by lighterage was a job undertaken by the carrier, after the skins had passed into its custody. *The fact that it delegated this part of the carriage to another is of no moment. Bulkley* v. *Naumkeag Co.*, 24 How. 386, 16

> L. Ed. 599; *Petersburg Line* v. *Norfolk-Virginia Peanut Co.* (C. C. A.), 172 F. 321. *The truth is that this lighterage was part of the loading of the ship, and section 1 of the Harter Act* (46 U. S. C. A. sec. 190) *renders void all provisions relieving carriers from liability for loss caused by negligence in loading cargo.* See *Insurance Co. of North America* v. *North German Lloyd* (D. C.), 106 F. 973, 976; *The Seaboard* (D. C.), 119 F. 375. So the exception is valid only in so far as the loss arose from risk of craft to and from ship and not chargeable to negligence." (Italics ours.)

The same principle was considered and the same conclusion reached in *Insurance Co. of North America* v. *North German Lloyd*, 106 Fed. 973 (Dist. of Md., aff'd 110 Fed. 420 (C. C. A. 4)). See, also, *Bulkley* v. *Naumkeag Steam Cotton Co.*, 24 How. 386.

Although the master of the lighter gave Wilhelmsen a receipt for the two shipments of cargo, petitioner argues that it had nothing to do with that. Petitioner had directed Manhattan to lift the cargo and bring it to petitioner's pier. We submit that the receipt given by Manhattan, so far as concerns the issues which this case involves, was petitioner's receipt.

POINT II.

Petitioner is not entitled to the benefit of the Fire Statute (R. S. 4282; 46 U. S. C. 182).

Petitioner complains that the courts below did not afford it the benefit of the Fire Statute, although Manhattan was exonerated from liability under the terms of that statute. The Fire Statute (R. S. 4282; 46 U. S. C. 182) affords an extraordinary benefit to a vessel owner; under its terms the owner cannot be held liable for dam-

age to cargo resulting from fire even though caused by the negligence of the owner's own employee, unless that employee is of such high rank as to be the owners' *alter ego.*

Manhattan was entitled to the benefit of the Fire Statute because it owned the lighter "Sydney" and the fire resulted from the negligence of a minor employee: the mate of the barge. Petitioner is not entitled to the protection of the Fire Statute because it did not own the lighter (R., p. 59), and the Fire Statute by its terms only protects the owner and a charterer who mans, victuals, and navigates the vessel (R. S. 4286; 46 U. S. C. 186). Petitioner did not man, victual or navigate the lighter "Sydney" (R., p. 58).

> *Petition of E. I. Du Pont de Nemours & Co., Inc.*, 18 F. (2d) 782-3, affirmed 19 F. (2d) 354 (C. C. A. 2).

In *The Munaires*, 12 Fed. Supp. 913 (E. D. of La.), cited by petitioner on page 16 of its brief, a fire broke out on a wharf and damaged cargo there and then was communicated to a vessel and damaged cargo on her. The court found that the fire did not result from any negligence of the vessel owner. Having made that finding, the District Court for the Eastern District of Louisiana expressed the view that even if the fire had resulted from the negligence of the carrier's employees on the pier, it could not be held liable for ensuing damage to cargo on the pier because the bills of lading contained an exception from liability for damage caused by fire "from any cause whatsoever occurring"; and that while the Fire Statute only relieved a shipowner from liability in connection with fire on shipboard, it permitted a shipowner to contract for exemption from liability for fire damage to cargo on a dock "on as broad a basis as that afforded him in respect of fires occurring on shipboard". This

view was purely *obiter* for the Court found that none of the carrier's employees was negligent in any way.

When the issue has been squarely presented, it has been decided that the Fire Statute is not susceptible to such distortion or extension.

> *The City of Clarksville*, 94 Fed. 201, 204 (D. Ind.);
> *The Egypt*, 25 Fed. 320, 323-4 (S. D. N. Y.).

See also:

> *Constable* v. *National S. S. Co.*, 154 U. S. 51, 62;
> *Morewood* v. *Pollok*, 18 Eng. Law & Eq. 341, 118 Eng. Rep. 614, 616.

The bill of lading exception on which petitioner relies in the present case, is made invalid by Section 1 of the Harter Act. It must necessarily be petitioner's argument that although it is clear that the Fire Statute does not by its terms afford petitioner any relief, while the Harter Act definitely governs the rights of the parties, inasmuch as petitioner would have been entitled to the benefit of the Fire Statute if it had owned the lighter, the Court should afford it the benefit of that statute and disregard the Harter Act.

CONCLUSION.

The respondents respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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